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10-7-94 cc: JWC LPB TAM/WRR orig File cc: mine File

OCT 7 1994

IN THE UTAH SUPREME COURT

LARSON LIMESTONE COMPANY, FARRELL LARSON, AND GERALD LARSON,	:	**DOCKETING STATEMENT SUBJECT TO ASSIGNMENT TO THE COURT OF APPEALS**
Petitioners,	:	
vs.	:	
STATE OF UTAH, DIVISION OF OIL, GAS AND MINING,	:	Case No. Cause No. S/049/011
Respondents.	:	Docket No. 94-017

1. **DATE OF ENTRY OF JUDGMENT OR ORDER APPEALED FROM:** August 19, 1994.

2. **NATURE OF POST-JUDGMENT MOTIONS AND DATES FILED**: None.

3. **DATE AND EFFECT OF ORDERS DISPOSING OF POST-JUDGMENT MOTIONS**: None.

4. **DATE OF FILING NOTICE OF APPEAL**:

5. **JURISDICTION**: Jurisdiction is conferred on the Utah Supreme Court by Utah code Ann. section 78-2-2 (3)(e)(iv) (Supp. 1993), U.C.A. 63-46b-16 (1).

6. **NAME OF BOARD OR AGENCY**: Board of Oil, Gas and Mining.

7. **NATURE OF PROCEEDING**: This petition is to review findings of fact, conclusions of law and an order of the Board of Oil Gas and Mining.

8. **STATEMENT OF FACTS**:

Petitioners own and operate commercial quarries on the West side of Utah Lake. The quarry has been operated since the late 19th century when it was first opened by U & I Sugar. The quarry essentially has two products. The primary product is rock aggregate. A secondary product is high calcium limestone. with respect to the high calcium limestone operation, Petitioners have operated as a small mining operation. Over a period of several years, the Division of Oil, Gas and Mining (hereinafter the "Division") has determined that it believes the "disturbed area" of petitioners operation exceeded the five acre limitation of a small mining operation. Petitioners maintain that the high calcium limestone portion of their operation does not exceed five acres, and that the "disturbed area" reviewed by the Division is actually part of the rock aggregate operation which is excluded from regulation by the Division.

The Division petitioned the Board of Oil Gas and Mining (hereinafter the "Board") for an order requiring Larson Limestone Company to file a Notice of Intent to Commence Large Mining Operations and to post an interim reclamation surety in the amount of $50,000.00. The Division also requested that the Board order Larson to immediately cease mining operations and begin reclamation if Larson refuses to post the requested collateral.

The Board held a hearing on June 22, 1994. (it is unclear from the record whether this was a formal or informal hearing. The Board and the Division have treated it as formal, although the form

the Division used for its "Request for Agency Action" was only appropriate for an informal hearing. Petitioners have assumed despite the pleading deficiencies that this was an informal proceeding. Because this was noticed like an informal hearing Petitioners were never given an opportunity to conduct discovery). On August 19, 1994 the Division entered its "Findings of Fact, Conclusions of Law, and Order". The order requires the following:

A. Within 30 days of the date of this Order, Larson Limestone shall submit a Notice of Intent for Large Mining Operations;

B. If, within 3 months from the date of this Order, the final permit has not been approved by the Division and a reclamation surety bond submitted and approved by the Board, Larson shall submit an interim reclamation surety acceptable to the Division and Board based upon the best information then available;

C. The Division will submit monthly reports to the Board during its regularly scheduled briefing sessions in order to keep the Board abreast of developments in this matter; and

D. The Board retains continuing jurisdiction over this matter.

E. Pursuant to Utah Code Ann. section 63-46b-13 (1989), any party may file a motion for reconsideration within 20 days of the issuance of this order. Any party may also file a petition for judicial review within 30 days after the issuance of this Order Pursuant to Utah Code Ann. section 63-46b-14 (1989).

(Rule 641-109-100 of the Administrative Rules governing the

Division of Oil Gas and Mining requires that proposed findings of fact, conclusions of law and an order be prepared and served upon all parties five days prior to submission to the Board for signature. The same rule allows any other parties of record to file objections to the proposed findings of fact, conclusions of law and order within five days of service. Unfortunately, the Board entered the Findings of Fact, Conclusions of Law, and Order on August 19, 1994. The signed Findings of Fact, Conclusions of Law and Order were not mailed to petitioners until August 26, 1994. Petitioners were never served with a copy of the proposed findings of fact, conclusions of law, and order. The petitioners received the signed order by Mail on August 29, 1994. When the findings of fact, conclusions of law, and order were received the time for filing an objection to the order under R641-109-200 had lapsed.)

9. **ISSUES FOR REVIEW AND STANDARD OF REVIEW**.

The issues which are available for review in a cases like the case at bar are found in U.C.A. 63-46b-16. Petitioner's first issue for appeal is based on U.C.A. 63-46b-16 (b). The issue can be stated as follows: Has the agency acted beyond the jurisdiction conferred by any statute. U.C.A. 40-8-4 (8)(b) specifically exempts from regulation "the extraction of sand, gravel, and rock aggregate." Petitioner's operation is primarily a rock aggregate operation. In regulating the rock aggregate portions of the operation, the agency is acting beyond its jurisdiction.

The standard of review is a correction of error standard. Savage Indus., Inc. v. Utah State Tax Comm'n., 811 P.2d 664 (Utah

1991). Morton Int'l, Inc., v. Utah State Tax Comm'n., 814 P.2d 581 (Utah 1991). Bevans v. Industrial Comm'n., 790 P.2d 573 (Utah Ct. App. 1990).

The second issue for review is based on U.C.A. 63-46b-16 (d). The issue can be stated as follows: Has the Division of Oil, Gas and Mining erroneously interpreted or applied the law? Although there is no statutory authority, the Division has taken the position that "rock aggregate" must come from unconsolidated materials. Because Petitioners manufacture rock aggregate from blasting and crushing consolidated materials, the Division asserts jurisdiction over those operations.

The standard of review is a correction of error standard. Savage Indus., Inc. v. Utah State Tax Comm'n., 811 P.2d 664 (Utah 1991). Morton Int'l, Inc., v. Utah State Tax Comm'n., 814 P.2d 581 (Utah 1991). Bevans v. Industrial Comm'n., 790 P.2d 573 (Utah Ct. App. 1990).

The third issue on appeal is based on U.C.A. 63-46b-16 (g). Has the Division based its action on a determination of fact made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court? Specifically, it is petitioners contention that the Findings of Fact, Conclusions of Law, and Order issued by the Board contains, and is based on facts which were not in evidence before the board. The Findings if Fact, Conclusions of Law, and Order contain both factual determinations, and references to law which were never before the Board, and which were never raised in the hearing.

Petitioner has never had an opportunity to respond to any of these matters. On several issues despite the finding by the Board, the only evidence presented at the hearing was presented by Petitioners.

The standard of review is the "substantial evidence test" or "Whole record test." First Nat'l Bank v. County Bd. of Equalization, 799 P.2d 1163 (Utah 1990), Grace Drilling Co. v. Board of Review, 766 P.2d 63 (Utah Ct. App. 1989).

The final issue for review is based on U.C.A. 63-46b-16 (e). The issue can be stated as follows: Did the Division err in engaging in an unlawful procedure or decision-making process, and in failing to follow specified procedure? Specifically, there were several procedural irregularities in the proceedings before the Board. The Request for Agency Action was not in proper form for a formal hearing. No opportunity for discovery was given to petitioners. The proposed findings of fact, conclusions of law and order were never submitted to petitioners. The findings of fact, conclusions of law, and order were signed, but not mailed to petitioners until after the objection period had run. The Findings of Fact, Conclusions of Law, and Order contain facts and law that were never raised at the hearing and which are not in evidence.

The standard of review for unlawful procedure, failure to follow procedure is a correction of error standard. Savage Indus., Inc. v. Utah State Tax Comm'n., 811 P.2d 664 (Utah 1991). Morton Int'l, Inc., v. Utah State Tax Comm'n., 814 P.2d 581 (Utah 1991). Bevans v. Industrial Comm'n., 790 P.2d 573 (Utah Ct. App. 1990).

10. **CITATIONS TO DETERMINATIVE RULES AND DECISIONS:**

There are no previous court decisions directly deciding the issues in this matter. Statutes which will be helpful are as follows: U.C.A. 40-8-4 (8)(b), U.C.A. 63-46b-16, U.C.A. 63-46b-10. U.C.A. 63-46b-8, 63-46b-3

11. **RELATED OR PRIOR APPEALS:** None.

DATED this 5 day of October, 1994.

FISHER, SCRIBNER, MOODY & STIRLAND, P.C.

By: _____
THOMAS J. SCRIBNER
DONALD E. MCCANDLESS
Attorneys for Petitioners

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing, with postage prepaid, this 5 day of October, 1994:

Janet C. Graham
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_____

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

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IN THE MATTER OF THE PETITION FILED BY THE DIVISION OF OIL, GAS AND MINING FOR AN ORDER REQUIRING IMMEDIATE POSTING OF INTERIM RECLAMATION SURETY, AND SUBMITTING A NOTICE OF INTENTION TO COMMENCE LARGE MINING OPERATIONS, FROM LARSON LIMESTONE COMPANY, FARRELL LARSON AND GERALD LARSON, OPERATORS, LARSON LIMESTONE QUARRY, UTAH COUNTY, UTAH	:	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DOCKET NO. 94-017 CAUSE NO. S/049/011

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Pursuant to the Petition filed by the Division of Oil, Gas and Mining, this matter came before the Utah Board of Oil, Gas & Mining (the "Board"), Department of Natural Resources, on June 22, 1994, in the Boardroom of the Division of Oil, Gas and Mining, 3 Triad Center, 355 West North Temple, Salt Lake City, Utah. The following Board members were present at the hearing:

Judy F. Lever, Acting Chairperson
Kent G. Stringham
Jay L. Christensen
Raymond Murray
Elise L. Erler
Thomas B. Faddies

The Board was represented by William R. Richards, Esq., Assistant Attorney General for the state of Utah.

Thomas A. Mitchell, Esq., Assistant Attorney General for the state of Utah, represented the Division of Oil, Gas & Mining (the "Division"). James W. Carter, Director of the Division, and Anthony Gallegos, Reclamation Specialist, appeared for the Division.

Thomas J. Scribner, Esq., and Donald E. McCandless, Esq., of Fisher, Scribner, Moody and Stirland represented Larson Limestone Company. Farrell Larson and Gerald Larson appeared for Larson.

NOW THEREFORE, having considered the testimony of the parties and exhibits received into evidence, the Board makes and enters the following:

INTRODUCTION

This matter came before the Board on the Division's Petition for an order requiring Larson Limestone Company ("Larson") to file a Notice of Intent to Commence Large Mining Operations and to post an interim reclamation surety in the amount of $50,000. The Division also requested the Board to order Larson to immediately cease mining operations and begin reclamation if Larson refused to post the requested collateral.

Larson's defense is based on the argument that the Division does not have jurisdiction to regulate its mining operation. Larson theorizes that the majority of its mining operation involves activities that fall outside the regulatory structure of the Utah Mined Land Reclamation Act and, therefore, it is not required to submit a reclamation plan or post surety.

For the reasons set forth below, we find that Larson's mining activities constitute mining within the meaning of the Utah Mined Land Reclamation Act and that Larson is required to comply with the provisions of that Act and its implementing regulations.

FINDINGS OF FACT

A. Notice and Jurisdiction

Due and regular notice of the time, place and purpose of the June 22, 1994, hearing was given to all interested parties as required by law and the rules and regulations of the Board. The Board has jurisdiction over the subject matter and over all interested parties.

B. The Larson Limestone Mine

Larson is the owner and operator of a limestone quarry located in Utah County on the west shore of Utah Lake. (Tr. at 21.)[1] The quarry consists of horizons of limestone which vary in thickness and quality. The high quality calcium limestone is located in a single horizon approximately 65 feet thick and lies between broad horizons of lesser quality limestone. (Tr. at 123, 148.) The entire quarry is solid rock. Id. Mr. Larson described the geology of the quarry as follows:

> A. Material comes from the limestone quarry. Now the limestone quarry is bedded. And by that I mean there are different layers of material within the quarry. As far as gradation, it's all the same, solid rock. But as far as the mineral content, and the purity of that mineral, it's bedded. There's a major limestone bed of 65 feet thick. And there's -- the material above that and below that is lesser quality, and will not meet the criteria for high calcium limestone.

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[1] The quarry has been mined on and off since the late 19th century. U & I Sugar first owned and operated the quarry to extract high calcium limestone for use in refining sugar beets in Lehi, West Jordan, Spanish Fork and Provo. (Tr. at 118.) Larson purchased the quarry in 1984. (Tr. at 117.)

(Tr. at 123.) Because the high quality calcium limestone is interbedded with layers of solid rock consisting of lesser quality limestone, it is necessary to remove the overlying layers of rock to extract the higher quality limestone. There is no sand or gravel located at or associated with the quarry. (Tr. at 121.)[2]

During the course of its operations, Larson sold limestone for a variety of uses. (Tr. at 117, 119-21.) The size, shape and quality of limestone sold was determined by market demand. Larson first sold large irregularly shaped boulders. (Tr. at 119.) Later, Larson sold over 175,000 tons of high calcium limestone to power plants for use in power generation operations. (Tr. at 119-120.) Larson also sold limestone for road base, asphalt aggregate, slurry sand and landscape rock. (Tr. at 121.)

Larson markets its limestone under separate business names. High quality calcium limestone is sold under its corporate name, Larson Limestone Company. Lower quality limestone is sold under

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[2] Mr. Larson testified as follows:

> A. Yes, but I'll make a correction on a point. We do not have sand; we have manufactured sand that's 100 percent fractured. We do not have gravel. We often say if you want a round rock, you don't come to our place. We consider gravel round rock that is alluvial material that's mined out of a bank without blasting and drilling, and all of our materials are 100 percent fractured material, so therefore we call it rock aggregate.

(Tr. at 121.)

the assumed name Larson Rock Products. At present, Larson does not have a valid business license from Utah County. (Tr. at 129-30.)

All limestone mined from the quarry is extracted by drilling and blasting. After the material is blasted, it is sent to a crusher to be sized to meet the specifications of the buyer. The mechanical processes used in mining and processing the limestone are identical regardless of its size, shape or quality, or its end use. (Tr. at 124, 148-50.)[3]

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[3] As Mr. Larson testified:

Q. Mr. Larson, I have a question, if you don't mind. . . . What do you do, I mean not necessarily presently, but how have you recovered material from either the thick pure limestone or the rock aggregate limestones, if you will? Do you use the same procedures for both or --

A. Yes.

Q. What do you do?

* * * * * *

A. . . . . But we use the exact same method to extract each one.

Q. So, for both products, if you will, you have to drill?

A. Yes.

Q. And --

A. We drill . . . , put the explosive into a height of five and a half feet from the surface, fill the balance up with crushed material, blast that out, and it will yield material that is roughly 24 inch minus, in size, two foot and smaller. There will be

C. The Division's Regulation of the Mine

On January 21, 1988, the Division notified Larson that the mining of previously stripped or unconsolidated overburden at the quarry would be exempt from the Utah Mined Land Reclamation Act. (Tr. at 24; Ex. 2.) The Division also informed Larson that the Division would have jurisdiction to regulate Larson's operation if Larson decided "to mine the limestone formation by drilling and blasting." (Ex. 2.)

On May 12, 1988, Larson filed with the Division Notice of Intention To Commence Small Mining Operations. (Tr. at 27; Ex. 3.)[4] Larson described its operation as an open pit limestone mine, and stated that the total surface area to be disturbed by mining was 4.6 acres. Id. The Division informed Larson that

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> some material of that that's three to four foot rocks, that may be when the blast comes up some break. We segregate that and send that through the crusher.
>
> * * * * * *
>
> Q. So, you use the same mechanical processes, if you will, for --
>
> A. Yes.
>
> Q. To recover all the products that you sell?
>
> A. Yes. . . .

(Tr. at 148-150.)

[4] A small mining operation is one in which the disturbed area is smaller than 5 acres. Utah Code Ann. § 40-8-4 (15) (1988); see also Utah Admin. R. 647-1-106 (1994). Unlike a large mining operation, an operator of a small mining operation is relieved of the obligation to submit reclamation surety and a reclamation plan.

"[i]f you should decide to increase the mine site beyond five acres of unreclaimed surface disturbance at any time, you will be expected to file a more detailed plan and post a reclamation surety prior to such expansion." (Ex. 5.)

During the course of its mining operation, Larson filed annual reports with the Division pursuant to Utah Admin. R. 647-2-115. These reports described the general state of mining activities during the calendar year, including the amount of mineral extracted and extent of surface disturbance. Each report was certified by Larson to be true and correct. (Ex. 6, 7, 10, 11.)

Larson's Annual Reports did not accurately report the amount of mineral extracted from the quarry. (Tr. at 124-128.) Larson only reported the amount of high quality calcium limestone it extracted, and did not report the amount of lesser quality limestone which was mined and sold. Larson admitted that the amount of lesser quality limestone which was mined, but not reported, was approximately twice the amount of limestone which was reported to the Division.[5]

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[5] Mr. Larson explained his reporting practices as follows:

Q. And do you have a rough estimate of how much of the other materials you've pulled out of the site and used on other contracts in the aggregate business?

A. Well, year by year, I can tell you that, but it's roughly three times the amount of high calcium limestone left the quarry. Last year, or in '93, when we mined about 80,000 ton, we mined another 160,000 ton of rock

Larson's Annual Reports also did not accurately reflect the amount of surface area disturbed by mining operations. Rather, Larson based its calculations solely on the volume of high quality calcium limestone extracted from lower horizons of the quarry. As Mr. Larson testified:

> Q. Okay. How did you calculate the actual acreage?
>
> A. The actual acreage had been estimated since day one. I was never informed to pull a tape to the exact square footage on the acreage. I mostly calculated it based on the limestone that was extracted for the power plant contract.

(Tr. at 127-128.) Moreover, the reports reflect that the amount of surface disturbance was decreasing over time. On January 9, 1991, Larson submitted its annual report for the 1990 calendar year. (Ex. 6; Tr. at 37.) In that report, Larson stated that it had mined 30,000 tons of limestone that year and estimated that the total disturbed area at the mine was 4 acres. One year later, the Operator submitted its annual report for the 1991 calendar year. (Tr. at 39-40; Ex. 7). The Operator indicated that it had mined 20,000 tons of limestone but claimed that the

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aggregate.

(Tr. at 124.) Although Larson reported the amount of high quality limestone it produced, Larson never reported to the Division the amounts of the other limestone it produced. See, e.g., Ex. 11.

total disturbed acreage at the mine site had again decreased to a total of "1 or 2" acres.[6]

Because the Annual Reports indicated that the disturbed area was decreasing although no reclamation work had been undertaken, the Division questioned whether the reports accurately stated the total amount of disturbance at the mine site. The Division inspected the mine on April 15, 1992, but did not take measurements at that time. (Tr. at 41-43.) Shortly thereafter, the Division received a letter from Larson stating that the mine's total disturbed area was 3.5 acres. (Tr. at 43-44; Ex. 8.) The letter also contained a map outlining what the Operator believed to be the disturbed area at the mine. Because the Division believed that the map did not accurately represent the disturbed area, the Division asked Larson to submit a more accurate map and aerial photo. (Tr. at 47-48.) Larson responded on June 19, 1992, stating that it "stand[s] on our opinion of 3.5 acres of disturbed area." (Ex. 9; Tr. at 48-49.) Larson did not submit an aerial photo or revised map. Id.

On March 17, 1994, three Division employees met with Larson to measure the total area disturbed by mining activities. The

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[6] Larson submitted its annual report for 1992, stating that it had mined 84,000 tons of limestone ore and that the total disturbed area was 2.5 acres. (Ex. 11; Tr. at 48-51.) One year later, Larson submitted its 1993 annual report and represented that it had mined 75,000 tons of limestone ore, but that the total disturbed area was 3.5 acres. (Ex. 10; Tr. at 49-51.)

Division staff utilized a Topometric hip chain[7], and vehicle odometer to measure the areas they considered to be disturbed by mining activities. (Tr. at 55-58.) These areas included, but were not limited to, access roads, bench areas, stockpiles, and crushing and loading pads. (Ex. 13.) The Division did not measure the main quarry area, or two turnout areas, and it attempted to be conservative when establishing the boundaries of the disturbed area. (Tr. at 58-59.) Based on its calculations, the Division determined that a minimum of 20 acres had been disturbed. (Ex. 13; Tr. at 65-76.)

Thereafter, the Division requested that Larson File a Notice of Intention to Commence Large Mining Operations and to post an interim reclamation surety. When Larson refused to do so, the Division filed the present action. (Tr. at 78-79.)

DISCUSSION

I. IS THE LARSON LIMESTONE QUARRY EXEMPT FROM REGULATION UNDER THE UTAH MINED LAND RECLAMATION ACT?

While the Utah Mined Land Reclamation Act was broadly drafted to regulate nearly all forms of mineral extraction[8], the

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[7] A Topometric hip chain is a surveying instrument which can be used to measure land areas. (Tr. at 58). If used properly, it has an accuracy within two percent. Id. The topometric hip chain measures a distance by the rotation of a string around an engineered wheel. One person holds the end of the string, and another person walks a certain direction to the end point of a line and records the distance. The person then walks in another direction and the process is repeated until the exact area within a geometric shape is known. (Tr. at 101).

[8] The Act defines "mining operations," as any activity:

Act specifically exempts from regulation "the extraction of sand, gravel, and rock aggregate." Utah Code Ann. § 40-8-4(8)(b).[9] Larson contends that the majority of its mining operation involves the extraction of "rock aggregate" and therefore the Division does not have jurisdiction to regulate its activities.[10]

A. The Meaning of the Term "Rock Aggregate"

Larson would have us read the term "rock aggregate" as meaning the mining of solid rock in place by drilling, blasting,

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> conducted on the surface of the land for the exploration for, development of, or extraction of a mineral deposit, including but not limited to, surface mining and the surface effects of underground mining and in situ mining, on-site transportation, concentrating, milling, evaporation, and other primary processing.

Utah Code Ann. § 40-8-4(8)(a).

[9] Section 40-8-4(8)(b) specifically provides:

> "Mining operation" does not include: the extraction of sand, gravel, and rock aggregate; the extraction of oil and gas as defined in Title 40, Chapter 6; the extraction of geothermal steam, smelting or refining operations; off-site operations and transportation; or reconnaissance activities and activities which will not cause significant surface resource disturbance or involve the use of mechanized earth moving equipment such as bulldozers or backhoes.

Utah Code Ann. § 40-8-4(8)(b).

[10] While Larson acknowledges that it mines high quality limestone, Larson contends that the total disturbance associated with its limestone operation does not exceed three acres. Larson attributes the rest of its mine, and the remaining surface disturbance, solely to the mining of rock aggregate which by definition is exempt from regulation. Since only 3 acres of disturbance can be attributed to a regulated mining activity, Larson argues that the mine is not a large mining operation under the Act and Larson is not obligated to post reclamation surety or file a Notice of Intention to Commence Large Mining Operations.

and crushing to produce a final product. This we decline to do. Such a reading would contravene the clear intent of the Legislature. When the Legislature added the "sand, gravel, and rock aggregate" exception to the Mined Land Reclamation Act, it only intended to exclude operations extracting unconsolidated sand, gravel, and associated larger rocks. The legislative history is clear that the term "rock aggregate" was meant to be read in conjunction with the terms "sand" and "gravel." Representative Christensen, who introduced the amendment adding the term "rock aggregate" to the sand and gravel exemption discussed the meaning of "rock aggregate" as follows:

> Sometimes when you deal with sand and gravel, House members, you get some big rocks in there. And you kinda make small ones out of them. This is the aggregate part of it (1987).

H.B. 311 Legislative History. We therefore find that the Legislature intended to exempt only those operations involved in extracting unconsolidated sand or gravel and larger rocks associated with the sand or gravel deposit.[11] To this end, the term "rock aggregate" as used in Utah Code Ann. § 40-8-4(8)(b) must be interpreted to mean rock materials associated with a sand deposit, gravel deposit, or sand and gravel deposit that were created by alluvial[12] sedimentary processes. To this end, the

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[11] It is clear that the Legislature intended the term to be defined in a geologic sense. There is no support for the view expressed by Larson that "rock aggregate" should be defined by the end use of the mineral.

[12] The term "alluvium" is defined by the U.S. Bureau of Mines' Dictionary of Mining, Mineral and Related Terms, (1968) as

definition of rock aggregate specifically excludes any solid rock (bedrock) exposed at the surface of the earth or overlain by unconsolidated material. Thus, the mining (including drilling and blasting) of any solid rock or bedrock would not be exempt from the provisions of the Utah Mined Land Reclamation Act.

B. The Rule Of Ejusdem Generis

Our conclusion that the term "rock aggregate" must be read in conjunction with the terms "sand and gravel," comports with the rule of statutory construction ejusdem generis. That rule provides that where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects specifically enumerated. See generally 2A Sutherland, Statutory Construction § 47.17 (4th ed. 1984); see, e.g., Resolution Trust Corp., v. Dickinson Econo-Storage, 474 N.W. 2d 50, 52 (1991); Oklahoma v. Butler, 753 P.2d 1334, 1336 (Okla. 1987). In other words, "[u]nder the principle of ejusdem generis, general words following particular and specific words are not given their natural and ordinary sense, standing alone, but are confined to persons and things of the same kind or genus as those enumerated." Aanenson v. Bastien, 438 N.W. 2d 151, 156 (N.D.

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follows:

> alluvium a. clay silt, sand, gravel, and other rock materials are deposited in relatively recent geologic time as sorted or semisorted sediments in riverbeds, estuaries, and flood plains, on lakes, shores, and in fans at the base of mountain slopes. . . .

1989) (quoting Savelkoul v. Board of County Commissioners, 96 N.W. 2d 394, 398 (N.D. 1959)).[13] To this end, the generic term "rock aggregate," must be read to be in association with "sand and gravel." See, e.g., Resolution Trust Corp., v. Dickinson Econo-Storage, 474 N.W. 2d 50, 53 (N.D. 1991)(the term "other person" within the phrase "any occupant or tenant or any other person" must be read as referring to other persons of the same general class as occupants and tenants); Wulf v. Schultz, 211 Kan. 724, 508 P.2d 896 (1973)(lease of "natural gas, petroleum and other mineral substances" excludes limestone, coal, clay,

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[13] Sutherland has discussed the rule as follows:

> The doctrine of ejusdem generis is an attempt to reconcile an incompatibility between specific and general words so that all words in a statute and other legal instruments can be given effect, all parts of a statute can be construed together and no words will be superfluous. If the general words are given their full and natural meaning, they would include the objects designated by the specific words, making the latter superfluous. If, on the other hand, the series of specific words is given its full and natural meaning, the general words are partially redundant. The rule accomplishes the purpose of giving effect to both the particular and the general words, by treating the particular words as extending the provisions of the statute to everything embraced in that class, though not specifically named by the particular words.
>
> The resolution of this conflict by allowing the specific words to identify the class and by restricting the meaning of general words to things with the class is justified on the ground that had the legislature intended the general words to be used in their unrestricted sense, it would have made no mention of the particular words.

2A Sutherland, Statutory construction § 47.17 as p. 166 (footnotes omitted).

gypsum, gravel, rock and dirt under the doctrine of ejusdem generis); Oklahoma v. Butler, 753 P.2d 1334, 1337 (Okla. 1987)(the phrase "oil, gas and other minerals" only includes oil and gas and those minerals produced as constituents and components thereof); Griffith v. Cloud, 764 P.2d 163, 164 (Okla. 1988)(the phrase "oil, gas and other minerals" does not include limestone); Cronkhite v. Falkenstein, 352 P.2d 396, 398-399 (Okla. 1960)(he phrase "oil, gas and other minerals" does not include gypsum rock).

If we were to follow Larson's theory, the rock aggregate exception found in Utah Code Ann. § 40-8-4(8)(b) would devour the rule. A mining operation, however large, would be free from regulation so long as it crushed, sized and sold waste rock as a commodity. All mines in Utah would be capable of avoiding regulation so long as they could create a commercial market for their overburden or other waste rock. "We must presume that the legislature did not intend absurd and ludicrous results or unjust consequences." Resolution Trust Corp. v. Dickinson Econo-Storage, 474 N.W.2d 50, 52 (1991) citing Witthauer v. Burkhart Roentgen, Inc., 467 N.W.2d 439, 445 (N.D. 1991). The Legislature could not have intended to defeat the underlying purpose of the Utah Mined Land Reclamation Act by creating such a broad exception.

C. The Larson Limestone Quarry Is Not A Sand, Gravel and Rock Aggregate Operation

We find as factual matter the Larson limestone quarry is not

a "sand, gravel and rock aggregate" operation within the meaning of Utah Code Ann. § 40-8-4(8)(b). Sand is a naturally occurring unconsolidated or moderately consolidated accumulation of rock and mineral particles between 1/16mm to 2mm which has been deposited by sedimentary processes.[14] Gravel is defined as naturally occurring unconsolidated or moderately consolidated accumulation of rock and mineral particles with the dominant size range being between 2mm and 10mm which has been deposited by sedimentary processes.[15] There is no evidence that Larson

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[14] The AGI Glossary of Geology defines sand as follows:

> sand [geomorph] (b) A loose aggregate of unlithified mineral or rock particles of sand size; an unconsolidated or moderately consolidated sedimentary deposit consisting essentially of medium-grained clastics. The material is most commonly composed of quartz resulting from rock disintegration, and when the term "sand" is used without qualification, a siliceous composition is implied. . . . .

The USBM Dictionary of Mining, Mineral and Related Terms defines sand as follows:

> sand. a. Separate grains or particles of detrital rock material, easily distinguishable by the unaided eye, but not large enough to be called pebbles; also, a loose mass of such grains, forming an incoherent arenaceous sediment. . . .

[15] The AGI Glossary of Geology defines gravel as follows:

> gravel (a) An unconsolidated, natural accumulation of rounded rock fragments resulting from erosion, consisting predominantly of particles larger than sand diameter greater than 2mm, or 1/12 in.

The USBM Dictionary of Mining, Mineral and Related Terms defines gravel as follows:

> gravel. a. Small stones and pebbles or a mixture of

extracted aggregate rocks from an unconsolidated sand and gravel deposit. The evidence is to the contrary. Mr. Larson specifically testified that there are no sand or gravel deposits located within the quarry:

> A. Yes, but I'll make a correction on a point. We do not have sand;. . . . We do not have gravel. We often say if you want a round rock, you don't come to our place. We consider gravel round rock that is alluvial material that's mined out of a bank without blasting and drilling, and all of our materials are 100 percent fractured material, so therefore we call it rock aggregate.

(Tr. at 121.)

Accordingly, we find that Larson's limestone operation falls under the jurisdiction of the Utah Mined Land Reclamation Act.

II. IS THE LARSON MINE A LARGE MINING OPERATION WITHIN THE MEANING OF THE UTAH MINED LAND RECLAMATION ACT

The Utah Mined Land Reclamation Act (the "Act") provides that "[e]very operator shall be obligated to conduct reclamation and shall be responsible for the costs and expenses thereof." Utah Code Ann. § 40-8-12.5 (1988).[16] Every mining operator,

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> sand and small stones; more specifically, fragments of rock worn by the action of air and water, larger and coarser than sand.

[16] The Legislature specifically passed the Act to insure that lands disturbed by mining are reclaimed. The Legislature stated its objectives as follows:

> The objectives of mined land reclamation are:
>
> (1) to return the land, concurrently with mining or within a reasonable amount of time thereafter, to a

therefore, regardless of the size of its operation, is required to reclaim upon cessation of mining operations. See Utah Code Ann. § 40-8-12.5 (1988).

A. The Distinction Between Small and Large Mining Operations

Although the duty to reclaim is independent of the size of the mining operation, the size of a mine is relevant for determining other obligations under the Act. Operators of "Large Mining Operations" are required to post collateral to secure their reclamation obligations[17] and are required to provide extensive plans demonstrating how mining will take place and what reclamation will occur during or after mining is completed. Operators of "small mining operations," conversely, are only required to sign a reclamation agreement, and are not required to

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> stable ecological condition compatible with past, present, and probable future local land uses;
>
> (2) to minimize or prevent present and future on-site or off-site environmental degradation caused by mining operations to the ecologic and hydrologic regimes and to meet other pertinent waste and federal regulations regarding air and water quality standards and health and safety criteria; and
>
> (3) to minimize or prevent future hazards to public safety and welfare.

Utah Code Ann. § 40-8-12 (1988).

[17] The Board of Oil, Gas and Mining is entrusted with determining the adequacy of the form and amount of surety. The Board is authorized to accept the following types of surety: "a written contractual agreement, collateral, a bond or other form of insured guarantee, deposited securities, or cash." Utah Code Ann. § 40-8-14(3) (1988). The Division is required to hold the surety until such time as it determines that the reclamation is complete. Id.

post reclamation surety. See Utah Code Ann. § 40-8-14.

Whether a mining operation is a large or small one is determined by the size of the surface disturbance caused by, or associated with, mining activities. The dividing line is five acres. Large Mining Operations are defined as operations which have a "disturbed area of more than five surface acres at any time." Utah Admin. R. 647-1-106. Small mining operations are defined as those operations which have a "disturbed area" less than five surface acres. Utah Code Ann. § 40-8-4(10)(15) (1988); see also Utah Admin. R. 647-1-106. The term "disturbed area" is defined as "the surface land disturbed by mining operations." Utah Admin. R. 647-1-106. The term "mining operations," in turn, is broadly defined to include "those activities conducted on the surface of the land for the exploration for, development of, or extraction of a mineral deposit, including, but not limited to, surface mining . . . on-site transportation, concentrating, milling, evaporation, and other primary processing." Utah Code Ann. § 40-8-4(8)(a) (1988).[18]

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[18] The Act and the Division's regulations further define "lands affected" by mining to include:

> the surface and subsurface of an area within the state where mining operations are being conducted, including, but not limited to: (a) on-site private ways, and railroads; (b) land excavations; (c) exploration sites; (d) drill sites or workings; (e) refuse banks or spoil piles; (f) evaporation or settling ponds; (g) stockpiles; (h) leaching dumps; (i) placer areas; (j) tailings ponds or dumps; (k) work, parking, storage, or waste discharge areas, structures, and facilities.

Utah Code Ann. § 40-8-4(7)(1988); see also Utah Admin. R. 647-1-

B. The Nature And Extent Of Surface Disturbance At The Larson Quarry

Although the exact extent of surface disturbance is unknown,[19] the testimony is uncontroverted that there is a minimum of 20 acres of disturbance caused by, and associated with, Larson's mining operation. (Ex. 13; Tr. at 65-76.)[20] Larson itself does not contest the Division's surface disturbance measurements. Rather, Larson contends that the surface disturbances were related solely to what it termed its "rock aggregate" operation. As we have already found, however, the

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106. The Act and its implementing regulations are not clear concerning how the term "lands affected" relates to the term "disturbed area." The natural reading of the two terms and the provisions of the Act would compel the conclusion that the term "lands affected" is a further definition of the term "disturbed area." To this end, the definition of "lands affected" would simply be a list of the types of disturbances which would be considered to be associated with mining activities. Since the regulations are not clear on this point, however, the Board has not relied on the definition of "lands affected" for determining the amount of disturbed acreage existing at the quarry. Rather, we have relied solely upon the terms "disturbed area" and "mining operation."

[19] It is impossible to determine the exact acreage of disturbed area because Larson never submitted a detailed map delineating the total amount of disturbed area, and the Division only conservatively estimated the amount of disturbed acreage.

[20] We are persuaded that the Division measured only those areas recently disturbed by mining activities, and that the Division was conservative in its measurements. (Tr. at 59). The Division did not measure areas which had been disturbed prior to the enactment of the Utah Mined Land Reclamation Act in 1975. (Tr. at 58-59) The Division also did not measure the actual limestone quarry due to the potential danger associated with measuring the highwalls of the quarry. (Tr. at 59). Moreover, the Division did not measure each disturbed area to the full extent of its disturbance for the specific purpose of insuring that its measurements would not overestimate the amount of disturbance.

Larson quarry is not a "rock aggregate" operation within the meaning of Utah Code Ann. § 40-8-4(8)(b). Moreover, we find as a factual matter that the disturbed acreage measured by the Division and summarized in Exhibit 13 was used in connection with all mining operations on the site. (Tr. at 108-109). The 22 areas measured by the Division included access roads, benches, stockpiles, boneyards, and the crushing and loading pads, all of which were essential to the extraction and primary processing of limestone mined from the quarry. Mr. Gallegos testified as follows:

> Q. You were also asked the question of whether all of the facilities that you saw could be part of a sand and gravel rock aggregate operation, and as I remember your testimony, it was that the answer was yes, they could handle both. Was there anything that you saw that could also not be used as part of a limestone mining operation?
>
> A. You are asking if there were features or structures that would not be considered part of the limestone operation?
>
> Q. Yes.
>
> A. I believe all the features there could be considered part of the limestone operation.
>
> Q. Did you see anything to separate the facilities at all, between crushing or dealing with rock aggregate versus limestone?
>
> A. Nothing specifically.

(Tr. at 108-09.) There is no basis in the record to distinguish between operations associated with the extraction of the high quality limestone and the lesser quality limestones. Therefore, as a factual matter, there is absolutely no basis to allocate

percentages to the disturbed area attributable to the extraction of high quality limestone and the extraction of the lesser quality limestones. Thus, even assuming the validity of Larson's argument, we would still find as a factual matter that the disturbed area exceeded five acres.

C. The Division's Grant of Variances

In 1988, the Division granted Larson variances for leaving unreclaimed highwalls and certain roads which the operator could demonstrate had a valid post-mining land use. The Division also granted Larson a variance from salvaging topsoil in the limited instance in which the safety of the equipment operator was at issue.

Larson argues that any disturbed areas which have been granted variances should not be included in the disturbed area for purpose of determining whether its operation is a large or small mining operation. We disagree.

The central issue in determining whether a mining operation is large or small is the extent of the surface area disturbed by mining activities.[21] Whether an operator is relieved of some or all of the performance standards or reclamation requirements for a particular area does not address the issue of whether the area

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[21] As we discussed above, "disturbed area" is defined as "the surface land disturbed by mining operations." Utah Admin. R. 647-1-106. The term "mining operations," in turn, is defined to include "activities conducted on the surface of the land for the exploration for, development of, or extraction of a mineral deposit, including but not limited to, surface mining . . . on-site transportation, concentrating, milling, evaporation, and other primary processing." Utah Code Ann. § 40-8-4(8)(a) (1988).

was disturbed by mining.[22] Therefore, the Division's approval of variances for certain areas is irrelevant to the issue of whether a mining operation should be considered large or small.[23]

Even if the Board were to accept Larson's argument to exclude all areas subject to variances from the total disturbed area, the remaining disturbed area would still significantly exceed five acres. Indeed, excluding all highwalls and roads from the disturbed area calculation[24] would only reduce the disturbed area by approximately 2 acres. Over 19 disturbed acres would remain, well over the amount necessary to classify the mine as a large operation.

CONCLUSIONS OF LAW

A. The Larson limestone quarry falls under the definition

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[22] The type and extent of a variance may well be relevant for determining how much reclamation security is required to adequately secure the Division.

[23] There is no evidence of a reclamation plan demonstrating that Larson is in fact entitled to variances for the roads or its top soil storage requirements. As discussed above, Larson was granted a variance for roads which have a valid post-mining land use. There is no evidence indicating that Larson has established which roads do in fact have a valid post-mining land use. Similarly, Larson was only relieved of its top soil storage requirements where the safety of the equipment operator precluded the salvaging of soils. There is also no evidence that Larson has demonstrated which areas would qualify for such a variance. Therefore, if it were relevant, this Board would be unable to determine which areas, if any, would be entitled to a variance from the Act's reclamation requirements.

[24] That would involve deleting areas 3, 4, 5, 6, 16 from the Division's Exhibit 13. The highwall variance would have no effect on the total disturbed acreage since the Division did not measure the quarry, or highwalls within it, due to safety considerations.

of "Mining Operation" as that term is used in Utah Code Ann. § 40-8-4(8)(b) (1988), and is not a "rock aggregate" operation as that term is used in Utah Code Ann. § 40-8-4(8)(b) (1988).

B. The Larson limestone quarry is a Large Mining Operation within the meaning of the Mined Land Reclamation Act because the surface disturbance caused by and associated with its mining operation as a whole substantially exceeds five acres.

ORDER

A. Within 30 days of the date of this Order, Larson Limestone shall submit a Notice of Intent for Large Mining Operations;

B. If, within 3 months from the date of this Order, the final permit has not been approved by the Division and a reclamation surety bond submitted and approved by the Board, Larson shall submit an interim reclamation surety acceptable to the Division and Board based upon the best information then available;

C. The Division will submit monthly reports to the Board during its regularly scheduled briefing sessions in order to keep the Board abreast of developments in this matter; and

D. The Board retains continuing jurisdiction over this matter.

E. Pursuant to Utah Code Ann. § 63-46b-13 (1989), any party may file a motion for reconsideration within 20 days of the issuance of this Order. Any party may also file a petition for judicial review within 30 days after the issuance of this Order

pursuant to Utah Code Ann. § 63-46b-14 (1989).

DATED this 19 day of August 1994.

STATE OF UTAH
BOARD OF OIL, GAS AND MINING

Judy F. Lever, Acting
Chairperson

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER for Docket No. 94-017, Cause No. S/049/011 to be mailed by certified mail, postage prepaid, on this 26th day of August 1994, to the following:

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9/16

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IN THE UTAH SUPREME COURT

LARSON LIMESTONE COMPANY, FARRELL LARSON, AND GERALD LARSON,	:	PETITION FOR WRIT OF REVIEW
Petitioners,	:	
vs.	:	940440
STATE OF UTAH, DIVISION OF OIL, GAS AND MINING,	:	Case No.
	:	Cause No. S/049/011
Respondents.	:	Docket No. 94-017

Petitioners, Larson Limestone Company, Farrell Larson and Gerald Larson, by and through their counsel, Donald E. McCandless, petition the Utah Supreme Court for a writ of review directing the Respondent to certify its entire record, which shall include all of the proceedings and evidence taken in this matter, to this court. This petition seeks review of the entire order.

DATED this 14th day of September, 1994.

FISHER, SCRIBNER, MOODY & STIRLAND, P.C.

By: Donald E. McCandless
DONALD E. McCANDLESS
Attorneys for Petitioners

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing, with postage prepaid, this 14th day of September, 1994:

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